ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION I

CACR 06-873

APRIL 11, 2007

COREY POE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE CARROLL COUNTY CIRCUIT COURT, EASTERN DISTRICT
[NO. CR-05-4-ED]

HONORABLE ALAN DAVID EPLEY, JUDGE

AFFIRMED

Appellant Corey Poe, who was twenty-one years old at the time of the alleged offenses, was charged with the rape of two minor girls, D.T. and C.G., and a minor boy, S.T. The offenses were alleged to have occurred in the home of D.T. and S.T., who are siblings. Mr. Poe is D.T.'s and S.T.'s stepbrother and also lived in the home, and C.G. is a cousin of the other children who occasionally spent the night there. After a jury trial, Mr. Poe was acquitted of any offense against S.T., but was convicted of the lesser-included offenses of second-degree sexual assault against D.T. and C.G. Mr. Poe was sentenced to consecutive prison terms of 150 months, and now appeals.

Mr. Poe raises three assignments of error in this appeal. First, he argues that the trial court erred in not permitting him to elicit testimony regarding possible sexual abuse of D.T. by someone other than him, where the State opened the door to the issue. Next, Mr. Poe

contends that he was denied his constitutional right to confront the State's witnesses. Finally, Mr. Poe asserts that the trial court erred in limiting the evidence that he wanted to proffer for purposes of appeal. We affirm.

At the jury trial, Angela Allyn, who is D.T.'s and S.T.'s aunt, testified that D.T. and S.T. came to her house to spend the weekend beginning on December 30, 2004. On that afternoon D.T. insisted on taking a bath, and Mrs. Allyn ran the bath water for her. When D.T. undressed, Mrs. Allyn noticed redness and bruising in her genital area and asked D.T. about it. According to Mrs. Allyn, D.T. replied, "I can't tell you, because Corey will kill my mom and dad." Then D.T. indicated that Corey had touched her inappropriately. Mrs. Allyn asked if anyone else had touched her, specifically inquiring about D.T.'s uncle, father, and grandfather, and D.T. responded, "No, it was Corey." According to Mrs. Allyn, none of the children had made any statements to her about being touched by anyone else. Based on D.T.'s allegations against Mr. Poe, Mrs. Allyn contacted D.T.'s mother and the police.

Officer Alan Hoos went to Mrs. Allyn's home to investigate the case on January 1, 2005. Officer Hoos spoke with S.T., and S.T. stated that on at least two prior occasions Mr. Poe had forced him to have oral sex. Officer Hoos interviewed Mr. Poe, and Mr. Poe stated that he had been sleeping in D.T.'s bed for the past few nights. However, Mr. Poe never admitted any of the allegations against him.

D.T.'s mother, Catherine Poe, stated that she is married to appellant's father and that S.T., D.T., and her other three minor children live with them. According to Mrs. Poe, both S.T. and D.T. told her that appellant had sexually abused them.

D.T. testified that she had just turned ten years old. She recounted an incident when C.G. was spending the night and they went to sleep in D.T.'s bed. According to D.T., Mr. Poe entered the bedroom, took her clothes off, and "put his privates in my privates." D.T. stated that it was rough and that it hurt. She further indicated that Mr. Poe had done that to her "a lot of times" before.

C.G. testified that she is nine years old. On the night at issue, she stated that Mr. Poe got into bed with her and D.T., and that Mr. Poe "put his finger inside my private."

Jane Parsons and Melissa Myhand are forensic biologists for the Arkansas State Crime Lab. These witnesses established that semen was found on D.T.'s bed sheet that matched Mr. Poe's DNA.

Charla Jamerson is employed at a forensic nursing clinic and saw D.T. on January 4, 2005. According to Ms. Jamerson, D.T. told her that her stepbrother, Corey Poe, had touched her "private" with his "pee pee," and that it occurred in her bed when her cousin C.G. was spending the night. D.T. told Ms. Jamerson that this had happened often, and that Mr. Poe warned her that he would kill everyone in the house if she told anyone. D.T. also stated that Mr. Poe had touched C.G. Ms. Jamerson conducted a physical examination of D.T., and discovered abnormal findings consistent with repeated blunt force trauma to the hymenal ring.

Mr. Poe's first argument on appeal is that he should have been allowed to elicit testimony about possible sexual abuse against D.T. by persons other than him. He acknowledges that, pursuant to the rape shield statute, Arkansas Code Annotated section 16-42-101 (Repl. 1999), admissibility of a victim's prior sexual conduct is normally inadmissible. However, Mr. Poe argues that the State opened the door to such evidence when it asked Mrs. Allyn on direct examination whether D.T. had made any allegations that anyone else had touched her, to which Mrs. Allyn responded that D.T. had not.

Mr. Poe notes that, in her testimony, Mrs. Allyn stated that she affirmatively asked D.T. whether anyone else had touched her inappropriately, specifically inquiring about other family members, including her husband, J.C. In addition, Mrs. Allyn divulged that she never left the children under J.C.'s supervision alone because he drinks. Mr. Poe also notes that in his interview with the police, he told Officer Hoos that J.C. was "really weird" and that the children acted weird when they would return from J.C. and Mrs. Allyn's home. Mr. Poe asserts that his defense in this case centered around proof that someone other than him may have abused D.T. The trial court refused to allow Mr. Poe to cross-examine Mrs. Allyn or D.T.'s mother on whether there had been any possible sexual abuse of the children by someone else, and Mr. Poe asserts that this was error where the State had already asked questions that come under the protection of the rape shield statute.

We affirm appellant's first point on appeal due to his noncompliance with Ark. Code Ann. § 16-42-101(c)(1) (Repl. 1999), a provision of our rape shield law that provides that a written motion must be filed by the defendant with the court at anytime prior to the time

that the defense rests. Subsequent to such a written motion, an in camera hearing shall be held for the trial court to determine whether or not the offered proof may be introduced, pursuant to subsection (c)(2). Because Mr. Poe failed to file a written motion offering evidence of D.T.'s prior sexual contact, the trial court committed no error in refusing to permit the desired cross-examination of D.T.'s aunt and mother.

A similar issue arose in a rape case on appeal before the supreme court, *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004), where the supreme court wrote:

> After the State's case, Hanlin sought to introduce evidence that L.H. had been sexually abused in 1995 in Texas and that the 1995 abuse caused the damaged hymen. The circuit judge denied the oral motion to allow this evidence following L.H.'s testimony about her virginity. The judge noted that defense counsel had not followed the rape-shield procedures required by § 16-42-101 in that he had failed to make a rape-shield motion in writing and had not had a rape-shield hearing.
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> Hanlin urges that the circuit judge committed prejudicial error by denying him the right to recall L.H.'s parents for the purpose of questioning them on whether L.H. was sexually abused in Texas in 1995. He further argues that the circuit judge abused his discretion by allowing the prosecutor to open the door and offer L.H.'s testimony of her virginal status but then by denying the defense the opportunity to rebut that testimony. According to Hanlin, the situation was made even worse because of the linkage between L.H.'s virgin testimony and Dr. Jones's medical history about L.H.'s damaged hymen.
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> Though we confess to having some question about whether the prosecutor in fact did open the door to proof regarding L.H's prior sexual history, *see Marcum v. Sate*, 299 Ark. 30, 771 S.W.3d 250 (1989), we will not address this issue.
>
> Our rape-shield law clearly provides that a "written motion" must be filed by the defendant with the court at any time prior to the time that the defense rests. *See* Ark. Code Ann. § 16-42-101(c)(1) (Repl. 1999). This was not done. Hanlin argues that he was placed in an untenable position and was not able to file a written motion because the trial was well underway. We have no doubt that it would have been somewhat difficult to file a *written* motion. Nonetheless, that is a mandatory requirement of the statute, and Hanlin was required to comply. We hold that the

> circuit court did not abuse its discretion in denying Hanlin's motion to introduce proof of the 1995 sexual abuse due to his noncompliance with our rape-shield law.

Id. at 530-31, 157 S.W.3d at 190. As in *Hanlin*, *supra*, Mr. Poe's failure to comply with a mandatory requirement of the statute resulted in no abuse of discretion on the part of the trial court in denying his request.

Mr. Poe's second argument on appeal is related to the first. He contends that the trial court's refusal to allow him to cross-examine the witnesses about possible sexual offenses against D.T. by other persons constituted a denial of his constitutional right to confront witnesses. However, our supreme court has repeatedly held that our rape shield statute does not violate an accused's right to confront the witnesses against him and his right to due process of law. *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993); *Kemp v. State*, 270 Ark. 835, 606 S.W.2d 573 (1980); *see Marion v. State*, 267 Ark. 345, 590 S.W.2d 288 (1979) (an in camera hearing in a rape case held pursuant to [Ark Code Ann. § 16-42-101(c)(2)(A)], for the purpose of determining admissibility of evidence concerning the victim's prior sexual conduct, provides the accused with a full and fair opportunity to confront his accuser). An in camera hearing to determine the admissibility of the desired cross-examination was not held due to appellant's failure to file a written motion in compliance with the rape shield law. Therefore, this argument is without merit.

Finally, Mr. Poe argues that the trial court erred in limiting the proffered testimony that he elicited from D.T.'s mother, Catherine Poe. During the proffer, appellant established that Mrs. Poe had asked D.T. whether anyone else, including J.C., had touched her. However, the trial court prohibited Mr. Poe from eliciting D.T.'s answer to her mother's

question on the basis of hearsay. Mr. Poe asserts that such testimony would not have been hearsay and was necessary to our inquiry to the issues presented in this appeal.

An offer of proof is not necessary when the substance of the evidence sought to be introduced is apparent from the context within which the questions are asked. *Pryor v. State*, 71 Ark. App. 87, 27 S.W.3d 440 (2000). It is evident by context that Mr. Poe's proffer was intended to elicit evidence pertaining to allegations of sexual misconduct committed by J.C. against D.T. And for the reasons previously stated in this opinion, the trial court committed no error in refusing to allow Mr. Poe to cross-examine the witnesses about these allegations. Thus, any error on the part of the trial court in limiting the proffered testimony was harmless.

Finally, we note that subsequent to submission of the parties' briefs, Mr. Poe filed a motion to supplement the record with tape recordings of conversations between the deputy prosecutor, an investigator, and Mrs. Poe, which were proffered at trial but by mistake not included in the record. Because a review of those proffered tapes is not necessary to our review of this appeal, we deny appellant's motion.

Affirmed.

GLOVER and HEFFLEY, JJ., agree.